CGB-CC-0733

## Before the **Federal Communications Commission** Washington, DC 20554

FILED/ACCEPTED AUG 3 0 2007

Federal Communications Commission Office of the Secretary

In the Matter of:	)
Baerclaw Productions, L.L.C.	) ) ) CSR
Video Programming Accessibility	)
Petition for Exemption of Closed Captioning Requirements	) )

To: The Secretary

## BAERCLAW PRODUCTIONS, L.L.C. PETITION FOR EXEMPTION OF CLOSED CAPTIONING REQUIREMENTS

Baerclaw Productions, L.L.C. ("Baerclaw Productions"), by counsel, herby petitions for an exemption of the closed captioning requirements of Section 79.1 of the Commission's rules.1

**Background.** Section 713 of the Communication Act of 1934, as amended ("the Act"), Video Programming Accessibility, was added to the Act by Section 305 of the Telecommunications Act of 1996.<sup>2</sup> In enacting Section 713, Congress recognized that, in certain situations, the costs of captioning might impose an "undue burden" on video programming providers or owners, and it authorized the Commission to adopt appropriate exemptions.<sup>3</sup> Congress defined "undue burden" to mean "significant difficulty or expense."4 In determining if the closed captioning requirements will impose an undue burden, the statute requires the Commission to consider the following factors: (1) the

<sup>47</sup> C.F.R. § 79.1. 47 U.S.C. § 613. 47 U.S.C. § 613(d)(1). 47 U.S.C. § 613(e).

nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.<sup>5</sup>

Section 79.1(d)(8) provides an exemption for locally produced and distributed non-news programming with no repeat value and of local interest.<sup>6</sup> Section 79.1(d)(4) also provides and exemption for video programming for which the content of the soundtrack is displayed visually through text.<sup>7</sup>

Baerclaw Productions produces a wide variety of television programs including documentaries, 30-minute program length commercials (commonly referred to as infomercials) as well as 30 and 60-second commercials. In addition, Baerclaw Productions also films a number of specialty programs for its corporate clients. Baerclaw Productions has produced such shows as Make Your Move, You Wish, Healthy Lifestyles, and Phoenix's Best New Homes. These programs have high production values, costing up to \$50,000 per episode to shoot, produce and edit. It costs Baerclaw Productions \$650 per half hour to close caption a program. Most of the programs, which Baerclaw produces, air either locally or regionally on various cable outlets. For these high production value programs, the cost of closed captioning is marginal and not a burden to Baerclaw Productions' clients. Baerclaw Productions is not requesting an exemption of the closed captioning requirements for these programs.

In 2006, Baerclaw Productions started producing half-hour commercials for a Phoenix area automobile dealership and has since added a second dealership. These

<sup>&</sup>lt;sup>5</sup> Id. see also 47 C.F.R. §79.1 (f).

<sup>6 47</sup> C.F.R. § 79.1(d)(8).

<sup>&</sup>lt;sup>7</sup> 47 C.F.R. § 79.1(d)(4).

<sup>&</sup>lt;sup>8</sup> The statements herein are supported by the Declaration of William Baer, President and CEO of Baerclaw Procductions. See, Exhibit 1 hereto.

technically simple programs do no more than display a series of used cars on the television screen. For each car, state law requires the auto dealer to show in writing, the make, model, year, pricing and payments and a complete disclosure of down payments, interest and payment details for purchasing or leasing the vehicle. See Attachment to Exhibit 1 hereto. In addition, the program displays simultaneously on the screen, the name and telephone number of the sponsoring car dealer. Other infomercials Baerclaw Productions produces may take 2 to 3 weeks of filming, followed by a significant amount of in-studio editing. Baerclaw Productions can videotape and edit a car dealer commercial in one and a half days. Consequently, Baerclaw Productions only charges \$3,500 to produce this type of commercial. Typically the commercial airs on Saturday/Sunday mornings with a very limited life span because of the changing inventory of vehicles at car dealerships.

Baerclaw Productions' primary competition is the print media. The production cost difference between a half hour commercial compared to print media is significant, because newspapers do not charge their clients production fees. Car dealers must pay Baerclaw Productions a fee to produce the commercial then they must pay a television station a fee to broadcast the commercial. Baerclaw Productions would like to increase the number of car dealerships in the Phoenix area that currently utilize 30-minute commercials to sell their used cars. However, if it is required to provide closed captioning for these commercials, Baerclaw Productions believes that the net result will be that its auto clients' advertising business will migrate to radio and newspaper competitors, causing economic loss to both Baerclaw Production and the local television stations which currently air these commercials. Baerclaw Productions is requesting an

for car dealerships. The other programs Baerclaw Productions produces are not a burden to close caption. As Mr. Baer states in his Declaration, "For these high production value programs, the cost of closed captioning is marginal and not a burden to our clients."

**Discussion.** Advertising is generally regarded as ancillary to the main programming content, which is the focus of Section 713. In this regard, the statute does not provide for captions on all televised material, nor does it specifically address advertising. The Commission recognized that in some contexts advertising should be treated separate from programming and thus not subject to the captioning obligations.9 The Commission, however, concluded that program-length commercials should be subject to captioning requirements. The Commission reasoned that "such programs are generally prerecorded, generally distributed nationwide, and are formatted to resemble traditional television." In the case of Baerclaw Productions' car dealer commercials, while the programs are prerecorded, they are of limited duration, not distributed beyond the local market for which they are produced and do not resemble traditional television programming. Car dealer commercials are made for local-market customers and are aired only in that market and then only for a very limited period of time (generally Saturday and Sunday mornings). Finally, Baerclaw Productions' commercials are not formatted to resemble traditional television programming. Rather they are merely an inventory of available cars offered for sale in a particular market.

<sup>&</sup>lt;sup>9</sup> Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility, 13 FCC Rcd 3272, 3345 (1997). ("Closed Captioning Order").

<sup>10</sup> Id. at 3346.

Section 79.1(d)(4) provides an exemption for video programming for which the content of the soundtrack is displayed visually through text. 11 In codifying this section of the rules the Commission reasoned, "that a requirement for captioning of such programming, where information is already provided visually with little or no relevant audio track, would be unnecessary and economically burdensome as it would outweigh the benefits provided by the captions."12 In the case of Baerclaw Productions' commercials, all the relevant data about the cars offered for sale, as a matter of state law, must be provided visually as text. In addition, the name and telephone number of the sponsoring car dealer appears on the screen. As discussed above, each car shown must display on the screen, the make, model, year, pricing and payments and a complete disclosure of down payments, interest and payment details for purchasing or leasing the vehicle. 13 The information presented aurally is mere banter, designed to grab the attention of channel surfing viewers.

Section 79.1(d)(8) provides an exemption for locally produced and distributed non-news programming with no repeat value and of local interest. 14 The commercials that Baerclaw Productions produces are non-news programming specifically prepared for the particular market in which they are broadcast. Because inventory is constantly changing the commercials have no repeat value.

Requiring Baerclaw Productions to caption its program length commercials would place an undue burden on Baerclaw Productions, and cause it to incur significant

 <sup>&</sup>lt;sup>11</sup> 47 C.F.R. § 79.1(d)(4).
 <sup>12</sup> Closed Captioning Order, at p.3344.
 <sup>13</sup> See, Attachment to Exhibit 1.

<sup>&</sup>lt;sup>14</sup> 47 C.F.R. § 79.1(d)(8).

difficulty and expense. Further, Baerclaw Productions cannot pass on the cost of closed captioning to the car dealers. Baerclaw Productions competes with radio and print media. In all likelihood, advertisers would shift their advertising budgets to more cost-effective forms of advertising. Not only would Baerclaw Productions lose business, but so would the television stations that serve the local community and rely on these program-length commercials to supplement their revenues. The programming in question is advertising which does not merit the same public interest considerations as news or entertainment programming. Further, state law requires that all relevant information such as the price, make and model number of the car be displayed on the television screen. A hearing-impaired person watching a Baerclaw Productions commercial would get not only the name and telephone number of the car dealer, but also all the relevant information concerning the automobile being offered for sale. Little more could be provided and then only at great expense.

<sup>&</sup>lt;sup>15</sup> 47 C.F.R. § 79.1.

**Conclusion.** For the reasons set forth herein, Baerclaw Productions should be granted an exemption from Section 79.1 of the Commission's rules.

Respectfully submitted,

BAERCLAW PRODUCTIONS, L.L.C.

Arthur V. Belendiuk

Its Attorney

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August 30, 2007

## DECLARATION

I, William Baer, declare under penalty of perjury that the following is true and correct:

I am the President and C.E.O. of Baerclaw Productions, L.L.C.

I have read the foregoing Petition for Exemption of Closed Captioning

Requirements. Except for facts of which official notice may be taken or for which

another source is cited, the statements made in the Petition for Exemption of Closed

Captioning Requirements are true and correct to the best of my knowledge and belief.

Baerclaw Productions produces a wide variety of television programs including documentaries, 30-minute program length commercials (commonly referred to as infomercials) as well as 30 and 60-second commercials. We also produce a number of specialty programs for our corporate clients. These programs tend to be educational in nature and our clients do not broadcast them on television or cable stations.

Baerclaw Productions close captions all programming it produces for television or cable broadcast. Baerclaw Productions purchased closed captioning equipment in 2006 for \$ 1,170.40. It costs Baerclaw Productions \$650 (\$350 closed captioning costs plus 2 hours in-house editing time) per half hour program to complete all of the steps necessary to close caption each program. Baerclaw Productions has produced such shows as Make Your Move, You Wish, Healthy Lifestyles, and Phoenix's Best New Homes. These programs have high production values, costing up to \$50,000 per episode to shoot, produce and edit. Most of the programs, which we produce, air either locally or

regionally although a few have aired nationally on various cable outlets. For these high production value programs, the cost of closed captioning is marginal and not a burden to our clients. Baerclaw Productions is not requesting an exemption of the closed captioning requirements for these programs.

In 2006, Baerclaw Productions started producing half-hour commercials for a Phoenix area automobile dealership and has since added a second dealership. We are attempting to get more car dealers to advertise using the half hour commercial format. These technically simple programs do no more than display a series of used cars on the television screen. For each car, state law requires the auto dealer to show in writing, the make, model, year, pricing and payments and a complete disclosure of down payments. interest and payment details for purchasing or leasing the vehicle. See Attachment hereto. In addition, the program displays simultaneously on the screen, the name and telephone number of the sponsoring car dealer. Other programs we produce, such as Make Your Move, may take 2 to 3 weeks of filming, followed by several days to weeks of in-studio editing. Baerclaw Productions can videotape and edit a car dealer commercial in one and a half days. Consequently, we only charge \$3,500 to produce this type of commercial. Typically the commercial airs on Saturday and Sunday mornings with a very limited life span because of the changing inventory of vehicles at car dealerships.

Car dealers have other advertising options, including newspapers, radio, and conventional 30 and 60 second commercials. The added cost of producing closed-captioned commercials makes them uneconomical and therefore impractical for car dealers as a means of advertising.

If Baerclaw Productions is required to provide closed captioning for the commercials it produces, I believe that the net result will be that our auto clients' advertising business will migrate to radio and newspaper competitors, causing economic loss to both Baerclaw Production and the local television stations which currently air these commercials.

Baerclaw Productions is asking for an exemption of the Federal Communications

Commission's closed captioning rules, but only for the program length commercials it

produces for auto dealers.

Executed this 30th day of August 2007.

William Baer President

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